No. 18-96

In The Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

ZACKARY W. BLAIR, INTERIM DIRECTOR OF THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION; TENNESSEE FINE WINES & SPIRITS, LLC, DBA TOTAL WINE SPIRITS BEER & MORE; and AFFLUERE INVESTMENTS, INC., DBA KIMBROUGH FINE WINE & SPIRITS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT AFFLUERE INVESTMENTS, INC.

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Twenty-first Amendment does not empower states to withhold a retail liquor license from an otherwise eligible applicant simply because the applicant has not resided in the state for a specified number of years.

PARTIES TO THE PROCEEDING

Petitioner is Tennessee Wine and Spirits Retailers Association. Respondents are Zackary W. Blair, in his official capacity as Interim Executive Director of the Tennessee Alcoholic Beverage Commission; Tennessee Fine Wines & Spirits, LLC, dba Total Wine Spirits Beer & More; and Affluere Investments, Inc., dba Kimbrough Fine Wine & Spirits.

RULE 29.6 STATEMENT

Respondent Affluere Investments, Inc. is not the subsidiary or affiliate of any publicly-owned corporation, and no publicly-owned corporation owns 10% or more of its stock.

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INTRODUCTION

The Tennessee Wine and Spirits Retailers Association asks whether the Twenty-first Amendment allows a state to discriminate against newly-arrived residents, or residents of other states, in the occupation of owning a retail liquor store. It does not, and such discrimination is prohibited by both the Commerce Clause and Privileges or Immunities Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in Petitioner's brief, the Fourteenth Amendment's Citizenship and Privileges or Immunities Clauses require this Court's consideration. They provide:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

1. For Doug and Mary Ketchum, the ability to move to a new state in pursuit of a livelihood, and to be treated equally in that new state, is a matter of life and death. At their doctor's urging, they left their home in Utah after their thirty-two-year-old daughter, who has cerebral palsy and quadriplegia, began suffering severe health effects from the temperature inversion and air stagnation in the Salt Lake Valley. *See* J.A. 58, 63. The Ketchums settled on Tennessee after learning of an opportunity to purchase a wine and liquor store in Memphis. Becoming business owners would afford them flexibility to care for their daughter, who requires full-time attention, while also providing for their family. J.A. 58, 63, 65.

The Ketchums, through Affluere Investments, Inc. (hereinafter "Affluere"), signed an agreement to purchase Kimbrough Towers Fine Wine in April 2016, using much of their retirement savings to do so. J.A. 62-63. Doug and Mary are the sole officers, stockholders, and directors of Affluere. J.A. 62, 66-67, 79; Am. Answer of Tenn. Wine & Spirits Retailers Ass'n 1-2.[1]

In May 2016, while still in Utah, the Ketchums, through Affluère, applied for a retail liquor license with the Tennessee Alcoholic Beverage Commission (hereinafter "Commission"). J.A. 20, 59, 63. Although they knew that Tennessee had durational residency

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[1] *See also* Minutes of Apr. 25, 2017 Comm'n Meeting 1 [hereinafter Minutes], https://www.tn.gov/content/dam/tn/abc-documents/abc-documents/CM_MMRCM_MeetingMinutes_April252017.pdf.

requirements for retail liquor licenses, they also knew the Tennessee Attorney General had issued two opinions determining those requirements to be unconstitutional under the Commerce Clause. *See* Tenn. Op. Att'y Gen. No. 14-83 (2014); Tenn. Op. Att'y Gen. No. 12-59 (2012). Because of those opinions, the Commission was not enforcing the requirements and had issued licenses to non-residents. J.A. 63, 71-72; *see also* J.A. 51, 100.

In July 2016, Doug and Mary became residents of Tennessee, moving there in anticipation of acquiring the wine and liquor shop. J.A. 64. Around the same time, however, Petitioner Tennessee Wine and Spirits Retailers Association (hereinafter "Association") threatened to sue the Commission if it granted Affluere's application or a separate application that had been submitted by Respondent Tennessee Fine Wines & Spirits, LLC (hereinafter "Total Wine"). J.A. 15-16, 28-29, 39, 81.

According to the Association, approving the applications would violate Tennessee's durational residency requirements for retail liquor licenses, which require that: an individual applying for issuance or transfer of a license have resided in the state for at least *two years* immediately preceding the application; and an individual applying to renew a license (which expires after one year[2]) have resided in the state for at least *ten consecutive years* in the past. Tenn. Code Ann. § 57-3-204(b)(2)(A). For corporate applicants, a license may not be issued, transferred, or renewed unless *every*

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[2] Tenn. Code Ann. § 57-3-213(a).

"officer, director [and] stockholder owning any capital stock in the corporation" satisfies the durational periods applicable to individuals. Tenn. Code Ann. § 57-3-204(b)(3)(A), (B), (D). Given the interaction between the two-year application and ten-year renewal periods, the only practical way to open a retail liquor store—and keep it open after the first year—would be to wait to apply for a retail license until after nine years of Tennessee residency.

2. Faced with the Association's threat of a lawsuit if the Commission did not enforce durational residency requirements that were twice determined to be unconstitutional, the Commission deferred acting on Affluere's application, as well as Total Wine's application, for several months. J.A. 14, 20, 52, 64, 72, 80. It did so notwithstanding that the applications satisfied Tennessee's liquor licensing law in every other respect. J.A. 14, 39, 80-81, 95. Meanwhile, Doug Ketchum was unable to acquire full-time employment in Tennessee, did not have health benefits, and was unable to provide the level of care for his daughter that he and Mary would have been able to provide had they been able to start operating their own business. J.A. 64-65.

3. Finally, on September 21, 2016, the Commission's executive director (hereinafter "Director") filed a lawsuit in state court requesting a declaratory judgment regarding the constitutionality of Tenn. Code

Ann. § 57-3-204(b)(2)(A). J.A. 10-18. It named Affluere, Total Wine, and the Association as defendants. J.A. 10.[3]

The Association removed the case, J.A. 29, and the U.S. District Court for the Middle District of Tennessee re-aligned the parties. Given the Tennessee Attorney General opinions and the Director's indication that the Commission would have granted the licenses but for the Association's lawsuit, the court named Affluere and Total Wine as co-plaintiffs alongside the Director. J.A. 39, 45.

From that point, however, the Director's position changed. When Total Wine moved for partial summary judgment declaring the durational residency requirements unconstitutional, the Director *opposed* the motion and defended their constitutionality alongside the Association. *See* Pl. Clayton Byrd's Resp. to Mot. for Partial Summ. J. (ECF No. 73).

The district court granted Total Wine's motion, invalidating the requirements on dormant Commerce Clause grounds and enjoining their enforcement. Pet. App. 81a.[4] The court determined that, under *Granholm v. Heald*, 544 U.S. 460 (2005), "[t]he two-year . . . and ten-year . . . residency requirements applicable to both individuals and corporations discriminate against

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[3] The complaint referred to Affluere as Kimbrough Fine Wine & Spirits, the name under which the Ketchums intended to do business. J.A. 10.

[4] The court did not reach Total Wine's alternative argument that the requirements violate the Privileges and Immunities Clause of Article IV, section 2. Pet. App. 80a-81a.

out-of-staters by creating a barrier to entering the Tennessee retail liquor market." Pet. App. 73a-74a. It rejected the Association's attempt to cabin *Granholm* to laws discriminating against the *producer* tier of a state's three-tier alcohol distribution system, explaining that "*Granholm* affirmed Commerce Clause principles that apply to the treatment of people and things beyond liquor producers and products." Pet. App. 71a.

Having determined that the requirements are facially discriminatory, the court next observed that there "ha[d] been no showing" that they "advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Pet. App. 80a. The Director had "not offer[ed] the Court any concrete evidence" to justify the discrimination, and the court itself "fail[ed] to see how the retailer residency requirements even assist Tennessee to achieve a higher degree of oversight, control, and accountability over those involved in the ownership, management, and control of licensed retail premises." Pet. App. 78a, 80a.

4. Following the district court's decision enjoining the requirements, the Commission issued Affluere a license. *See* Minutes 1-3. Although the Ketchums were Tennessee residents at that point, they still did not satisfy the two-year durational period, and the Commission did not explain what would happen to Affluere's license, or the ability to renew it, "in the event [the district court's] ruling was reversed." *Id.* at 2.

5. The Association appealed, and the Director largely ceded defense of the durational residency requirements to the Association at the Sixth Circuit. Although he filed a brief defending the requirements, *see* Br. Appellee Clayton Byrd, ECF No. 30, he waived oral argument, allowing the Association to advocate the state's position. Order Granting Mot. to Waive Argument (ECF No. 52-1).

The Sixth Circuit affirmed the district court's judgment. Pet. App. 2a. It, too, held that "*Granholm* did not limit its application of the Commerce Clause to alcoholic-beverages laws regarding producers." Pet. App. 16a. Rather, *Granholm* "focused on a general Commerce Clause principle—the prohibition of discrimination against out-of-state economic interests." Pet. App. 17a. Thus, "regardless of the Twenty-first Amendment, 'state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.'" Pet. App. 19a (quoting *Granholm*, 544 U.S. at 487).

According to the court, however, the Twenty-first Amendment might nevertheless "immunize[ ]" the durational residency requirements from Commerce Clause scrutiny. Pet. App. 24a. To decide whether it did, the court "examine[d] 'whether the interests implicated by [the] state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'" Pet. App. 24a (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275-76 (1984)). The court determined that the regulation could not prevail, as its

durational residency requirements "do not relate to the flow of alcoholic beverages within the state," but rather "regulate the flow of individuals who can and cannot engage in economic activities." Pet. App. 27a. Although "[t]he Twenty-first Amendment gives a state the power to oversee the alcoholic-beverages business," the court held, "it does not give a state the power to dictate where individuals live." Pet. App. 27a.

Finally, the court noted that neither the Director nor the Association had argued that a reasonable, nondiscriminatory alternative was unavailable to achieve Tennessee's goals. Pet. App. 32a-33a. In that light, it held the requirements unconstitutional. Pet. App. 38a-39a.

Judge Sutton dissented in part. While he agreed that Tennessee's "application of the residency requirement to 100% of a retailer's stockholders," as well as "its imposition of a ten-year residency requirement for renewal of a license," were unconstitutional, he opined that the two-year requirement was permissible as it applied to individual applicants and to the officers and directors of corporate applicants. Pet. App. 54.

6. The Director has neither petitioned for certiorari nor filed a merits brief in this Court. Rather, he has allowed the Association—a lobbying organization for retail liquor-store owners—to stand in the state's shoes before the Court. *See* Letter from Herbert Slatery III, Tenn. Att'y Gen., to Scott Harris, Clerk, U.S. S. Ct. (Nov. 13, 2018).

SUMMARY OF THE ARGUMENT

Notwithstanding the Twenty-first Amendment, "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Granholm v. Heald*, 544 U.S. 460, 487 (2005). Under that principle, a state alcohol law that discriminates against interstate commerce "face[s] 'a virtually *per se* rule of invalidity'" and will survive only if the state proves the regulation "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

The discriminatory nature of Tennessee's durational residency requirements is obvious. By denying all but longtime Tennessee residents the right to sell liquor in the state, Tennessee has erected a barrier that protects its own residents against competition from residents of other states. The Association does not dispute this discrimination, nor does it attempt to carry its burden of sustaining the law. Instead, it asserts that the Twenty-first Amendment neuters the nondiscrimination principle, rendering it inapplicable to virtually all state alcohol regulation except that which discriminates against out-of-state *products*. According to the Association, "[s]tates may regulate the in-state sale of alcohol 'unfettered by the Commerce Clause,' provided 'they treat liquor produced out of state the same as its domestic equivalent.'" Pet'r's Br. 24 (quoting *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), and *Granholm*, 544 U.S. at 489).

The Twenty-first Amendment gives the states no such power. This Court's decisions in *Granholm* and its predecessor, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), endorsed the nondiscrimination principle across all aspects of alcohol regulation, and the Association's attempts to cabin the holdings of these cases is baseless. In neither case did this Court differentiate discrimination against out-of-state products from discrimination against out-of-state services or residents. And in neither case did the Court suggest the latter was authorized by the Twenty-first Amendment.

Nor are Tennessee's durational residency requirements somehow "saved" by virtue of being an exercise of the state's "core" Twenty-first Amendment powers. For one thing, this Court in *Granholm* abandoned any adherence to a "core concerns," or "core powers," test that it might have previously followed in the dormant Commerce Clause context. And even if such a test were still applicable, Tennessee's requirements are not an exercise of any such "core" Twenty-first Amendment power.

Tennessee's durational residency requirements, moreover, do not discriminate against out-of-state residents only—they also discriminate against newly-arrived residents of Tennessee itself, such as the Ketchums. Long-term Tennessee residents—those having resided in the state longer than two years—may own a retail liquor business, but residents without two years' tenure in the state may not. Moreover, even after a new resident satisfies the initial two-year period and is able to secure a license, it expires after one year, and

she may not renew it until she has resided in the state for *ten* years. Such discrimination against newly-arrived residents—*particularly* in their ability to own and operate a business—is prohibited by the Privileges or Immunities Clause of the Fourteenth Amendment.

Both the majority and dissenting justices in this Court's seminal case concerning that clause—the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)—recognized that the clause protects a newly-arrived resident's right to be treated equally in her new state of residence. So, too, did the Court in *Saenz v. Roe*, 526 U.S. 489 (1999), in which it invalidated a one-year residency requirement for full welfare benefits in California.

If the Privileges or Immunities Clause protects the right of a newly-arrived resident to be treated equally in the receipt of welfare benefits, it surely protects her right to be treated equally in the pursuit of a livelihood. History supports this conclusion, demonstrating that the original public understanding of the clause was that it would protect the right of the freedmen (and their white Northern supporters) to migrate in connection with a livelihood and be treated equally in their new states of residence.

Finally, invalidating Tennessee's durational residency requirements will not, as the Association contends, undermine the "federalist values inherent in the Twenty-first Amendment." Pet'r's Br. 47. Rather, enforcing the Privileges or Immunities Clause to protect a newly-arrived resident's right to earn a living on

equal terms with long-term residents will promote the very values of federalism that justify affording states discretion to regulate alcohol in the first place.

ARGUMENT

I. The Twenty-First Amendment Does Not Empower Tennessee To Impose Durational Residency Requirements For Retail Liquor Licenses

The Association does not contend that Tennessee's durational residency requirements survive ordinary Commerce Clause scrutiny, under which "[s]tate laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (quoting *Granholm*, 544 U.S. at 476). Therefore, the only question for this Court is whether the Twenty-first Amendment empowers the state to impose those requirements notwithstanding their discriminatory character. *See* Pet'r's Br. 17.

The Association offers two arguments as to why the Twenty-first Amendment supposedly provides such authority. First, it maintains that the Twenty-first Amendment shields state alcohol laws from the Commerce Clause's nondiscrimination principle so long as the laws do not discriminate against out-of-state *products*. Pet'r's Br. 24-36. Alternatively, it maintains that Tennessee's two-year residency requirement is "saved"

because it is related to the state's "core" powers under the Twenty-first Amendment. Pet'r's Br. 37-44.

Both arguments fail. For one thing, neither this Court's Twenty-first Amendment precedent nor its Commerce Clause precedent differentiates between discrimination against out-of-state products and discrimination against sales of products by out-of-state residents (or businesses owned by out-of-state residents). Moreover, the Court has made clear that the "core" concerns (or powers) test does not apply to laws that discriminate against interstate commerce. And in any event, Tennessee's durational residency requirements cannot pass that test.

A. The Nondiscrimination Principle Applies To All State Alcohol Laws, Not Merely Those Regulating Out-Of-State Products

Application of the Commerce Clause's nondiscrimination principle does not turn on whether a law discriminates against alcohol products from other states, on one hand, or sales of alcohol products by residents of other states (or businesses owned by residents of other states), on the other. Rather, *Bacchus* and *Granholm* make clear that the principle applies across *all* aspects of alcohol regulation and that the Twenty-first Amendment does not authorize either type of discrimination.

Bacchus concerned a Hawaii alcohol excise tax scheme that discriminated in favor of certain locally-produced beverages. After concluding that the tax

scheme failed the nondiscrimination principle, the Court considered whether the Twenty-first Amendment nevertheless authorized the discriminatory treatment. 468 U.S. at 274. The Court concluded that it did not.

The Twenty-first Amendment, the Court held, did not "repeal the Commerce Clause wherever regulation of intoxicating liquors is concerned." *Id.* at 275 (internal quotation marks omitted) (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964)). Both provisions, the Court stressed, "are parts of the same Constitution [and] each must be considered in light of the other." *Id.* (alteration in original) (quoting *Hostetter*, 377 U.S. at 332). The Commerce Clause, of course, "furthers strong federal interests in preventing economic Balkanization," the Court explained. *Id.* at 276. Meanwhile, "[t]he central purpose of" the Twenty-first Amendment "was *not* to empower States to favor local liquor industries by erecting barriers to competition." *Id.* (emphasis added). Yet Hawaii's discriminatory tax scheme did just that: it used "mere economic protectionism" to "promote a local industry." *Id.* "[B]ecause the tax violate[d] a central tenet of the Commerce Clause but [wa]s not supported by any clear concern of the Twenty-first Amendment," the Court rejected the state's argument that the tax scheme was authorized by the Twenty-first Amendment. *Id.*

Notwithstanding *Bacchus*'s broad statements regarding discrimination favoring "local liquor *industries*," the Association invites this Court to cabin the

decision to require adherence to the nondiscrimination principle only when states regulate liquor *products*. Pet'r's Br. 43. Nothing in the Court's reasoning, however, so much as hints at this limited interpretation. Rather, the Court spoke broadly of the evils of "economic Balkanization," "economic protectionism," and discrimination to promote "a local industry"—evils that can, and do, surface in areas far beyond the regulation of physical goods.

Moreover, even if *Bacchus* did leave the door open to the Association's narrow reading, *Granholm* shut it. *Granholm* involved a challenge to laws in two states that prohibited or severely restricted the ability of out-of-state, but not in-state, wineries to ship wine directly to in-state consumers. The Court had "no difficulty" concluding the statutes violated the Commerce Clause: by "their own terms," they violated the nondiscrimination principle. *Granholm*, 544 U.S. at 475, 476.

As in *Bacchus*, however, the states maintained that the Twenty-first Amendment authorized the laws, notwithstanding their discriminatory character. This Court rejected that contention. After reviewing the relevant history and concluding that the "aim of the Twenty-first Amendment was to allow states to maintain an effective and *uniform* system for controlling liquor," *id.* at 484 (emphasis added), the Court held unequivocally that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." *Id.* at 487. Under that principle, the Court explained, it had generally invalidated, "without further inquiry," statutes that "discriminate[] against

interstate commerce" or have the "effect" of "favor[ing] in-state economic interests over out-of-state interests." *Id.* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

The Court then cited *Bacchus* as an "example of this proposition," one that "forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny." *Id.* at 487-88. What's more, the Court cited approvingly Justice Scalia's concurrence in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), in which he opined that a Connecticut statute's "invalidity [wa]s fully established by its facial discrimination against interstate commerce." *Id.* at 344 (Scalia, J., concurring in part and concurring in judgment). This "discriminatory character *eliminate*[*d*] the immunity afforded by the Twenty-first Amendment." *Id.* (emphasis added).

Despite this Court's categorical rejection of the states' argument in *Granholm*, the Association maintains that the decision was extraordinarily narrow. It insists that *Granholm* bars only "laws that discriminate against out-of-state *goods*" and that it otherwise affords states "*complete control* over the structure of their in-state alcohol-distribution systems." Pet'r's Br. 44 (emphasis added).

In support of its interpretation, the Association focuses on a single paragraph of *Granholm* in which the Court stressed that the unconstitutionality of the three-tier system for alcohol distribution, which the Court had previously recognized as "'unquestionably

legitimate,'" "does not follow from our holding." *Granholm*, 544 U.S. at 488, 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). The Court then noted that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.* at 489.

It is this last sentence on which the Association hangs its myopic reading of *Granholm*. "So long as 'they treat liquor produced out of state the same as its domestic equivalent,'" the Association insists, "states may regulate the in-state sale of alcohol unfettered by the Commerce Clause." Pet'r's Br. 55 (internal quotation marks and citations omitted). But no matter how many times the Association quotes this sentence—*see id.* at 6, 7, 13, 21, 23, 24, 41, 44, 45, 55—it does not do the work that the Association claims it does.

For one thing, the paragraph from which the Association draws the sentence begins with this Court's assurance that the constitutional invalidity of the three-tier system "does not follow from our holding." *Granholm*, 544 U.S. at 488. That "holding" is that the Commerce Clause's nondiscrimination principle applies in the context of alcohol regulation—period. *Id.* at 487. The remainder of the paragraph is simply an explanation of how that holding applies in the factual circumstances of *Granholm*—not a limitation or qualification of the holding itself. Pet. App. 23a ("[*Granholm*] discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of 'producers' simply because *Granholm* involved

statutes addressing that step in the three-tier system.").

The sentence that the Association repeatedly invokes, moreover, gives no indication that the Twenty-first Amendment protects laws that discriminate against out-of-state retailers or wholesalers. Pet. App. 23a. If, as the Association contends, the Court had intended to draw a distinction between those tiers and producers, it presumably would have offered some rationale for doing so—or at least acknowledged that it *was* doing so. But it did not. *See Lebamoff Enters., Inc. v. Rauner*, No. 17-2495, 2018 WL 6191351, at *5 (7th Cir. Nov. 28, 2018) ("We will not assume that the Supreme Court, without saying so directly, announced a new bright-line rule creating different constitutional treatment for the producer tier, on the one hand, and the lower two tiers, on the other.").

Moreover, the nondiscrimination principle itself does not distinguish between discrimination against producers (or products) and discrimination against sellers (or sales). Outside of the alcohol context, this Court has applied the principle to invalidate discrimination *identical* to that effected by Tennessee's law—that is, discrimination against out-of-state ownership of in-state sellers. *Lewis v. BT Invest. Managers, Inc.*, 447 U.S. 27, 31, 49 (1980) (invalidating law that prohibited banks and trust companies with principal operations outside of Florida from "owning or controlling a business within the State that sells investment advisory services to any customer"); *see also C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)

(holding nondiscrimination principle prohibits discrimination "in favor of local . . . investment").

Finally, *Granholm*'s observation that the Court had previously recognized the constitutional legitimacy of the three-tier system says nothing about whether every aspect of a state's implementation of that system will pass constitutional muster. Inasmuch as the three-tier system has an essential aspect, it is the prohibition of vertical integration, *see Granholm*, 544 U.S. at 466, and there is nothing inherently discriminatory about such a prohibition. By calling the three-tier system "legitimate," then, the Court was merely explaining that there is no necessary tension between the system and the nondiscrimination principle. It was not giving its imprimatur to every conceivable regulation, no matter how discriminatory, adopted by a state that regulates alcohol through a three-tier system.

B. After *Granholm*, Discriminatory Laws Are Not Saved By The "Core" Concerns Of The Twenty-First Amendment

The Association offers an alternative, equally unavailing, argument for upholding Tennessee's two-year residency requirement: that it is "saved" because it was enacted pursuant to a "core" power of the Twenty-first Amendment. Even if the requirement discriminates, the Association maintains, and even if the nondiscrimination principle applies beyond products and producers, the requirement is still constitutional because of

its close relationship to the "core" concerns of the Twenty-first Amendment. The Association is mistaken: under *Granholm*, if a regulation is discriminatory, there is no inquiry into the "core" concerns of the Twenty-first Amendment. Even if there were, however, there is no relationship between Tennessee's durational residency requirements and "core" Twenty-first Amendment concerns.

The "core" analysis that the Association advocates originates in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), in which this Court held that the federal Sherman Act pre-empted a California law mandating retail price maintenance in the liquor industry. In so holding, the Court explained that "there is no bright line between federal and state powers over liquor." *Id.* at 110. "The Twenty-first Amendment," the Court noted, "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* But while "States retain substantial discretion to establish other liquor regulations," it added, "those controls may be subject to the federal commerce power in appropriate situations." *Id.* "The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.'" *Id.* (quoting *Hostetter*, 377 U.S. at 332).

The Court reaffirmed this case-by-case balancing approach in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), another pre-emption case that pitted Oklahoma's ban on advertisements of alcoholic beverages

against the FCC's regulation of cable operators. Oklahoma argued that even if its ban was invalid under normal pre-emption analysis, "the Twenty-first Amendment rescue[d] the statute from pre-emption." *Id.* at 711-12. In rejecting that argument, the Court asked "whether the interests implicated by [the] state regulation [we]re so closely related to the powers reserved by the Twenty-first Amendment that the regulation m[ight] prevail, notwithstanding that its requirements directly conflict[ed] with express federal policies." *Id.* at 714. The Court performed the balancing analysis described in *Midcal* to answer that question and concluded that "the Twenty-first Amendment d[id] not save the regulation from pre-emption." *Id.* at 716.

Although *Midcal* and *Capital Cities* involved direct conflicts between state liquor laws and federal legislation or regulation, their balancing approach found its way into dormant Commerce Clause jurisprudence, primarily through a pair of quotations of the opinions in *Bacchus*. *See Bacchus*, 468 U.S. at 275-76. This ad-hoc balancing of state and federal interests is now "commonly referred to as the 'core concerns' test." *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003). Lower courts, including the Sixth Circuit in this case, have continued to apply the test in Twenty-first Amendment cases to determine whether challenged laws that clearly violate the dormant Commerce Clause can nevertheless be "saved." *See* Pet. App. 23a-24a.

This is a mistake. *Granholm* indicates that the Twenty-first Amendment can never "save" a law that both (1) discriminates against interstate commerce

and (2) fails the strict review applicable to such laws under this Court's usual dormant Commerce Clause precedent. *See Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 21 (1st Cir. 2010) ("[I]t is unclear that this balancing test survives *Granholm*."); *Brooks v. Vassar*, 462 F.3d 341, 361 (4th Cir. 2006) (Goodwin, J., concurring in part and dissenting in part) ("I read *Granholm* as requiring us to apply the same dormant Commerce Clause analysis to discriminatory liquor laws that we apply to other discriminatory laws.").

Indeed, after *Granholm* concluded that the direct-shipment regulations at issue there discriminated against interstate commerce, 544 U.S. at 476, the Court did not consider, in accordance with *Capital Cities*, "whether the interests implicated by [the] state regulation[s]" were "so closely related to the powers reserved by the Twenty-first Amendment that the regulation[s] m[ight] prevail." *Capital Cities*, 467 U.S. at 714. Nor did the Court attempt to "reconcile," in accordance with *Midcal*, state and federal interests after "careful scrutiny of those concerns in [the] 'concrete case'" before it. *Midcal*, 445 U.S. at 110. Rather, the Court examined the history of the Twenty-first Amendment and concluded *categorically* that the amendment provides no protection to laws that discriminate against interstate commerce. *See Granholm*, 544 U.S. at 486, 487 (holding that "the Twenty-first Amendment does not supersede other provisions of the Constitution" and that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause"). This is an entirely different mode of analysis than the

Court adopted in *Midcal* and *Capital Cities*. *See id.* at 524 (Thomas, J., dissenting) (observing that *Granholm* did not apply the "core concerns" test).

Moreover, *Granholm* subjected the direct-shipment laws to the strict, searching review ordinarily applied to laws that discriminate against out-of-state commerce, and it concluded that the states had failed to demonstrate that their asserted interests—which included prevention of underage drinking—could not be adequately served by nondiscriminatory means. *Id.* at 489-91. A state's interest in preventing underage drinking is a subset of its interest in temperance, which this Court has recognized as a core, or central, concern of the Twenty-first Amendment. *Bacchus*, 468 U.S. at 276. *Granholm* thus makes clear that when a state alcohol regulation discriminates against interstate commerce, the proper approach for determining whether that discrimination is a permissible means of achieving the state's interest—even its core Twenty-first Amendment interest—is through the same scrutiny that applies to *all* laws that discriminate against interstate commerce.

In this regard, *Granholm* constituted a departure from *Midcal* and *Capital Cities*—and, to some extent, even *Bacchus*. But that departure was justified. History has repeatedly demonstrated that states will not hesitate to engage in "low-level trade war[s]" unless the judiciary stands ready to vigorously enforce the Commerce Clause's nondiscrimination principle. *Granholm*, 544 U.S. at 473. In the face of persistent and creative state efforts to protect local economic interests,

enforcement of that principle is the surest means of preventing the economic Balkanization that the Framers sought to avoid. *Id.* at 472.[5]

C. Even If The "Core" Concerns Test Still Applies, Tennessee's Durational Residency Requirements Fail It

Even if some form of Twenty-first Amendment "saving" test survived *Granholm*, the Sixth Circuit correctly concluded that no Twenty-first Amendment interests are implicated by Tennessee's durational residency requirements. The Association suggests three ways that the two-year requirement might potentially advance an interest in temperance, but the proposed rationales do not withstand even minimal scrutiny.[6]

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[5] Whether the core concerns test still applies to state liquor laws that merely burden, rather than discriminate against, interstate commerce remains an open question. *Cf. Lebamoff Enters., Inc. v. Huskey*, 666 F.3d 455, 462 (7th Cir. 2012) (Hamilton, J., concurring in judgment) (arguing Twenty-first Amendment precludes Commerce Clause scrutiny of laws burdening interstate commerce in a nondiscriminatory fashion).

[6] Some amici argue generally that residency requirements facilitate "orderly market conditions," citing *North Dakota*, 495 U.S. 423, 432. Yet *North Dakota* "did not state that 'ensuring orderly market conditions' was a core Twenty-first Amendment regulation." *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1020 (W.D. Mo. 1998). Moreover, no amicus provides any real explanation of what "orderly market conditions" means or how durational residency requirements further that interest. *See Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002) ("As for 'ensuring orderly markets,' we are not sure what that phrase means, but it certainly

First, the Association claims the requirement ensures that public officials who review applications for liquor licenses, and who might lack adequate "investigatory resources," will have sufficient knowledge about applicants' qualifications. Pet'r's Br. 48. The only relevant "qualification" in the statute, however, is that an applicant not have been convicted of a felony in the prior ten years. Tenn. Code Ann. § 57-3-208(b)(2). Moreover, the statute requires the *applicant* to secure and pay for a criminal background check, *id.*, so the officials' "investigatory resources" are irrelevant.

Second, the Association claims the requirement, in Judge Sutton's words, "increases the odds 'that [those who sell liquor] will be knowledgeable about the community's needs and committed to its welfare.'" Pet'r's Br. 48-49. The Association attempts to concretize Judge Sutton's suggestion, claiming that a longtime resident is (1) more likely to know which members of a community are underage or alcoholics, and (2) less likely to sell to either. Pet'r's Br. 49. The time a person has resided in a particular community, however, bears little relation to her knowledge of any special community needs germane to alcohol sales, and it bears no relation to her commitment to refuse liquor sales to those who should not have it. Yet even if the Association were correct, there is a profound mismatch between this hypothetical interest and the actual requirements of the statute. After all, the statute does not require that persons *selling* liquor in a licensed retail establishment be

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does not mean discrimination in a way that effectively forecloses out-of-state firms from the Florida market.").

longtime residents of the *community*—it requires that *owners* of the establishment be longtime residents of the *State of Tennessee*. Even by the Association's own logic, there is no reason to expect that a corporation's owners who reside in Knoxville will be uniquely knowledgeable about the special needs of a community in Memphis.

Finally, the Association claims the residency requirement promotes temperance by reducing the supply of retail alcohol in the state. Pet'r's Br. 50-51. It concedes, with remarkable understatement, that this effect is "indirect." Indeed. There are countless straightforward ways that a state can limit the retail availability of alcohol without discriminating against residents of other states. In fact, Tennessee *already* empowers local governments to "limit . . . the number of licenses issued within their jurisdictions." Tenn. Code Ann. § 57-3-208(c). Thus, the state need not—and may not—resort to economic protectionism to "indirectly" advance its interests.

The connection between temperance and durational residency requirements is so attenuated that Tennessee's statute would not satisfy even rational-basis scrutiny. But the "saving" test of *Midcal* and *Capital Cities* is far more stringent. The Court did not ask in those cases whether there was some conceivable connection between the challenged regulation and the interests underlying the Twenty-first Amendment. Rather, it asked "whether the interests implicated by [the] state regulation [we]re *so closely related* to the powers reserved by the Twenty-first Amendment that

the regulation m[ight] prevail, notwithstanding that its requirements directly conflict[e]d with express federal policies." *Capital Cities*, 467 U.S. at 714 (emphasis added). Tennessee's durational residency requirements fail this test, and for the same reasons, fail the far stricter scrutiny applicable to laws that discriminate against interstate commerce.[7]

II. Tennessee's Durational Residency Requirements Violate The Privileges Or Immunities Clause Of The Fourteenth Amendment

The durational residency requirements also violate the Privileges or Immunities Clause of the Fourteenth Amendment, and the Court should affirm the judgment below on this alternative ground if it disagrees with the reasoning on which that judgment rests. In fact, the last time this Court confronted a durational residency requirement, it did precisely that: in *Saenz v. Roe*, 526 U.S. 489 (1999), the Court affirmed, on Privileges or Immunities Clause grounds, a judgment that had invalidated the requirement under the Equal Protection Clause.

Moreover, this Court's Privileges or Immunities Clause precedent, while admittedly slim, squarely holds that the clause protects the right of newly-arrived state residents to be treated on equal terms with old-timers. It was on this very ground that the Court

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[7] For the reasons expressed in the Brief of Total Wine, this Court should invalidate Tennessee's residency scheme in its entirety, including its ten-year durational requirement.

invalidated California's one-year durational residency requirement for welfare benefits in *Saenz*. *Id.* at 502-11. If the clause protects newly-arrived residents against such discrimination in the disbursement of welfare benefits, it surely protects them against such discrimination in their freedom to earn a living, as the Ketchums are trying to do in Tennessee.

In fact, the original public understanding of the clause was that it would prohibit laws like the "Black Codes," which were passed by Southern states in the wake of the Civil War to restrict the mobility of the freedmen and keep them "in their place." The clause was designed in large measure to ensure that these newly-freed slaves (and all Americans) would be free to travel in pursuit of—and in pursuing—an honest living.

Finally, enforcing the clause to protect a newly-arrived resident's right to earn a living on equal terms with longer-term residents would promote the very federalism values that justify affording states discretion to regulate alcohol in the first place.[8]

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[8] Affluere's entitlement to a retail liquor license depends on the duration of residency of Doug and Mary Ketchum, its owners. The Ketchums are "citizen[s] of the United States" under the Privileges or Immunities Clause, and they risk losing their company's license—which was issued when they had resided in the state for only nine months—if the durational residency requirements are upheld. Thus, Affluere's entitlement to the license is "inextricably bound up" with the Ketchums' right to be treated equally in their new state of residence, and Affluere is "as effective a proponent of the right" as the Ketchums themselves. *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976); *see also Kowalski v. Tesmer*, 543 U.S. 125,

A. This Court Can And Should Reach The Privileges Or Immunities Issue

If this Court determines that the Sixth Circuit's reasoning was incorrect, it should nevertheless affirm that court's judgment on an alternative ground: the Privileges or Immunities Clause of the Fourteenth Amendment. "The question before an appellate Court," after all, "is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *McClung v. Silliman*, 19 U.S. 598, 603 (1821). The Court, moreover, may reach this issue despite its not being raised below. *E.g.*, *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 n.1 (2009) (reaching issue first raised in respondent's merits brief in this Court); *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 75 n.13 (1996) (same). In fact, in *Saenz*, this Court affirmed, on Privileges or Immunities grounds not developed below, a Ninth Circuit judgment that had invalidated a one-year durational residency requirement on other grounds.

The same course is warranted here. As discussed below, Affluere's Privileges or Immunities argument is supported (indeed, dictated) by the law and record, and affirming on that ground would not expand the scope of relief the Sixth Circuit granted. *See Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the

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129-30 (2004); *cf. Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 77-78 (1920) (invalidating, in case brought by corporation, statute that violated the Article IV Privileges and Immunities rights of its employees).

asserted ground would not expand the relief which has been granted."). Moreover, the Privileges or Immunities issue is "predicate to an intelligent resolution of the question presented" and is therefore "fairly included within" it. *Caterpillar Inc.*, 519 U.S. at 75 n.13 (internal quotation marks omitted). The question presented, after all, asks "[w]hether the Twenty-first Amendment empowers States" to impose durational residency requirements for retail liquor licenses. Pet. i; *see also* Pet'r's Br. 17 (stating the "only issue before the Court is whether the Twenty-first Amendment permits states to impose two-year durational-residency requirements"). The predicate to that question is that states would *not* have the power to impose such requirements in the absence of the Twenty-first Amendment, and that may be true for Commerce Clause *or* Privileges or Immunities Clause reasons.

B. This Court's Privileges Or Immunities Precedent Protects A Newly-Arrived Resident's Right To Be Treated On Equal Terms With Longtime Residents

This Court's Privileges or Immunities precedent is admittedly slim, but it squarely recognizes the right of a resident newly arrived in a state to be treated on terms equal with those who have resided there longer. Both the majority *and* dissenting opinions in the Court's seminal Privileges or Immunities Clause decision, the *Slaughter-House Cases*, recognized that the clause protects such a right. And while the Court had little to say regarding the clause over the next century

and a quarter, its last significant exposition of the clause, *Saenz v. Roe*, reaffirmed *Slaughter-House*'s holding that the clause protects this right.

In *Slaughter-House*, this Court was "called upon for the first time to give construction to" the Citizenship and Privileges or Immunities Clauses of the Fourteenth Amendment. 83 U.S. (16 Wall.) at 67. The Court began that construction with an overview of the circumstances leading up to the amendment's adoption. "[N]otwithstanding ... the abolition of slavery," it noted, Southern states had adopted laws—the Black Codes—"which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Id.* at 70. This led to "the conviction that something more was necessary in the way of constitutional protection." *Id.* That "something more" was the Fourteenth Amendment.

The first section of the amendment, the Court noted, "opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States." *Id.* at 72. "No such definition was previously found in the Constitution," and the "Dred Scott case" had held "that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States." *Id.* at 73. "This decision ... had never been overruled," the Court noted, and consequently "all the negro race who had recently been made freemen" by the Thirteenth Amendment "were still, not only not citizens, but were incapable of

becoming so by anything short of an amendment to the Constitution." *Id.* "To remove this difficulty," and "to establish a clear and comprehensive definition of . . . citizenship of the United States, and also citizenship of a State, the first clause of the first section"—the Citizenship Clause—"was framed." *Id.*

The Court noted that the next clause of the amendment—the Privileges or Immunities Clause—"speaks only of privileges and immunities of citizens *of the United States*." *Id.* at 74 (emphasis added). According to the Court, such rights of national (as opposed to state) citizenship exclude "nearly every civil right for the establishment and protection of which organized government is instituted." *Id.* at 76. Only those rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws" are protected by the Privileges or Immunities Clause. *Id.* at 79.

"But lest it should be said that no such privileges and immunities are to be found," the Court proceeded to identify some. *Id.* Among them is that "a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State." *Id.* at 80.

The dissenting justices criticized the majority's "much too narrow" construction of the clause. *Id.* at 129 (Swayne, J., dissenting). Significantly for this case, however, they agreed with the majority that one of the rights the clause protects is the right of a newly-arrived

resident of a state to be treated equally with longer-term residents. As Justice Bradley explained, "[a] citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen." *Id.* at 112-13 (Bradley, J., dissenting). Justice Field agreed, explaining that the clause "protect[s] . . . every citizen of the United States against" legislation that "discriminat[es] . . . against him in favor of others . . . resid[ing] in the same . . . State[ ]." *Id.* at 100-01 (Field, J., dissenting).

In the century following *Slaughter-House*, this Court invalidated durational residency requirements for impermissibly discriminating against newly-arrived residents of a state. *E.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250 (1974) (invalidating one-year requirement for free medical services); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (invalidating one-year requirement to vote in state elections); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating one-year requirement for welfare benefits). In so doing, however, the Court relied on the Equal Protection, rather than Privileges or Immunities, Clause, despite the common ground regarding the latter in *Slaughter-House*.

Finally, in 1999, this Court relied on the Privileges or Immunities Clause to invalidate a one-year durational residency requirement for full welfare benefits in California. In *Saenz v. Roe*, the Court eschewed the equal protection grounding of its earlier durational residency decisions. "What is at issue in th[e] case," the Court explained, is "the right of the newly arrived

citizen to the same privileges and immunities enjoyed by other citizens of the same State"—a right "plainly" protected in the very language of the Citizenship and Privileges or Immunities Clauses. 526 U.S. at 502, 503. "[I]t has always been common ground," the Court noted, that the clause protects the right of the newly arrived resident to be treated equally in her new state of residence, citing, as evidence, Justice Miller's *Slaughter-House* majority opinion and Justice Bradley's dissent. *Id.* at 503-04. "That right," the Court added, "is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States." *Id.* at 502.[9]

Chief Justice Rehnquist, in an opinion joined by Justice Thomas, dissented in *Saenz*. On one hand, he agreed that the Privileges or Immunities Clause prohibits a state from discriminating against the rights of newly-arrived residents. *See id.* at 513 (Rehnquist, C.J., dissenting) ("I agree with the proposition that a 'citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bonâ fide* residence therein, with the same rights as other citizens of that State.'" (quoting *Slaughter-House*, 83 U.S. (16 Wall.) at 80)). At the same time, he believed that a state may use a one-year durational requirement to "test" the bona fides of claims to residence before it disburses "certain in-state *benefits*," such as welfare or

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[9] In this regard, the right is an example of the "overlap" between rights of national and state citizenship. *See McDonald v. City of Chicago*, 561 U.S. 742, 853 (2010) (Thomas, J., concurring in part and concurring in judgment).

free medical care. *Id.* at 517 (emphasis added). States, he explained, must "retain the ability . . . to ferret out those who intend to take the privileges and run." *Id.* at 517. While the Chief Justice did not directly opine on whether a state could impose a durational residency requirement on a newly-arrived resident's ability to work or own a business as Tennessee has done, he stressed that California's requirement "ha[d] no effect whatsoever on" a newly-arrived resident's access to "employment . . . services." *Id.* at 520.

Justice Thomas authored a separate dissent (which Chief Justice Rehnquist joined), focusing on the original understanding of the Privileges or Immunities Clause. He drew heavily on the opinion of Justice Bushrod Washington riding circuit in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), concerning the "fundamental" rights protected by the Privileges *and* Immunities Clause of Article IV, section 2. Justice Thomas noted that "*Corfield* indisputably influenced the Members of Congress who enacted the Fourteenth Amendment," and that "[w]hen Congress gathered to debate the Fourteenth Amendment, Members frequently, if not as a matter of course, appealed to *Corfield*, arguing that the Amendment was necessary to guarantee the fundamental rights that Justice Washington identified in his opinion." *Saenz*, 526 U.S. at 526 (Thomas, J., dissenting). "[T]heir repeated references to the *Corfield* decision," he reasoned, "supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities of citizens' were fundamental rights, rather

than every *public benefit* established by positive law." *Id.* at 527 (emphasis added). Accordingly, he rejected "the majority's conclusion—that a State violates the Privileges or Immunities Clause when it 'discriminates' against citizens who have been domiciled in the State for less than a year in the *distribution of welfare benefits*—[because it] appears contrary to the original understanding" of the clause. *Id.* (emphasis added). But just as Chief Justice Rehnquist had noted the distinction between discrimination in welfare benefits and discrimination in employment services, Justice Thomas noted that one of the "fundamental" rights recognized in *Corfield* is "[t]he right of a citizen of one state . . . to reside in any other state, for purposes of *trade, agriculture, [or] professional pursuits*." *Id.* at 525 (emphasis added) (quoting *Corfield*, 6 F. Cas. at 552).

Most recently, in *McDonald v. City of Chicago*, the Court was asked whether the Second Amendment is enforceable against the states through the Privileges or Immunities Clause. A plurality of the Court concluded that it is instead incorporated through the Due Process Clause, 561 U.S. at 791 (plurality), but Justice Thomas, providing a fifth vote for the Court's judgment, concluded that "the right to keep and bear arms is a privilege of American citizenship" protected by the Privileges or Immunities Clause. *Id.* at 806 (Thomas, J., concurring in part and concurring in judgment). In so concluding, he examined the history of the clause to discern its original public meaning. He determined that "the privileges and immunities of American citizenship . . . overlap to at least some extent with the

privileges and immunities traditionally recognized in citizens in the several States." *Id.* at 853. In that light, he saw "no reason to interpret the Privileges or Immunities Clause as putting the Court to the extreme choice of interpreting the 'privileges and immunities' of federal citizenship to mean either all those rights listed in *Corfield*, or almost no rights at all," as *Slaughter-House* suggests. *Id.* at 852. Although he did not elaborate on which rights fall within this overlap, the right of a citizen of one state to change her residence to pursue a living in another state, and to be treated equally therein, is one of them, embraced by both *Slaughter-House* and *Corfield*.

In short, this Court's Privileges or Immunities Clause precedent—from *Slaughter-House* to *Saenz*—protects the right of the newly-arrived resident of a state to be treated equally with longer-term residents. Whether one believes, like the *Slaughter-House* majority, that the clause protects only a handful of rights of national citizenship or, like the *Slaughter-House* dissent, a broader array of "fundamental" rights such as those identified in *Corfield*, Tennessee's requirement of two years' residency to secure, and ten years' residency to renew, a retail liquor license abridges a right that falls squarely within the clause's protection. And whether one believes that the clause prevents discrimination against the newly-arrived resident generally or, rather, only in her "trade, agriculture, [and] professional pursuits," *Corfield*, 6 F. Cas. at 552, it prevents the type of discrimination effected by Tennessee's law.

C. As Originally Understood, The Clause Protected The Right To Migrate In Connection With Employment

In fact, it would be perverse to conclude that the clause does *not* protect the newly-arrived resident in her pursuit of an honest living, because the original public understanding of the clause was that it would protect the ability of the newly-freed slaves—and all Americans—to travel in pursuing their own free labor.

1. The Right To Migrate In The Antebellum Period

"From the earliest days of American nationhood, a free citizen ha[d] been able to claim a right of geographical mobility." Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 Cornell L. Rev. 523, 548 (1997). Yet African Americans, on the very theory that they were not national citizens, were denied that right.

"In a single section of the Constitution"—Article IV, section 2—"the framers drew an explicit line between free labor and slave labor," affording mobility to the former and denying it to the latter. *Id.* The first clause of that section—the Privileges *and* Immunities Clause—guaranteed "[c]itizens" the right to travel to and reside in another state in the pursuit of a livelihood, *see Corfield*, 6 F. Cas. at 551-52, while the section's third clause, the Fugitive Slave Clause, guaranteed that a slave who escaped to a free state could be returned to bondage.

But what of *free* blacks? Could they avail themselves of Article IV's protection of the right to migrate "for purposes of trade, agriculture, [or] professional pursuits"? In the antebellum years, Southern states—and even some in the North—did not think so. They enacted myriad laws to prohibit or inhibit black movement in economic pursuits—from the Negro Seamen Acts under which more than 10,000 black sailors were jailed upon entering Southern ports, *see* W. Jeffrey Bolster, *Black Jacks* 199, 206 (1997), to the constitutional and statutory provisions prohibiting or penalizing free black migration in Indiana, Illinois, and Iowa, *see* Raymond T. Diamond, *National and Local Perspectives on States' Use of Criminal Law to Regulate Undocumented or Unauthorized Migration*, 12 Loy. J. Pub. Int. L. 375, 380-81 (2011).

These states were able to enact such restrictions on the movement of free blacks because the citizenship status of free blacks was uncertain, and the protections of Article IV's Privileges and Immunities Clause extend only to the "[c]itizens of each State." U.S. Const. art. IV, § 2. While abolitionists argued for the citizenship of blacks under the clause, their position was rejected in *Dred Scott v. Sandford*, which held that blacks, slave or free, were not citizens and therefore did not enjoy "the privileges and immunities of citizens" protected by Article IV, section 2. 60 U.S. (19 How.) 393 (1857).

"*Dred Scott* did not distinguish between privileges and immunities of citizens of the United States and

citizens in the several States, instead referring to the rights of citizens generally." *McDonald*, 561 U.S. at 822 (Thomas, J., concurring in part and concurring in judgment). "It did, however, give examples of what the rights of citizens were," *id.*, and among them was the right of citizens of a state "to enter every other State whenever they pleased" and "to sojourn there as long as they pleased." *Dred Scott*, 60 U.S. at 417.

According to Chief Justice Taney, "it cannot be believed that the large slaveholding States regarded [blacks] as included in the word citizens, or would have consented to a Constitution which might" afford blacks this right. *Id.* at 416. He "was clearly upset by the possibility that if blacks were citizens of the United States, they would have the right to travel to other states, including Southern states, and, under Article IV, Section 2, would enjoy the privileges and immunities of citizens in those states." Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at* Dred Scott, 82 Chi.-Kent L. Rev. 49, 56-57 (2007).

In an ironic—and perverse—way, Justice Catron's concurring opinion also placed the right of migration among those protected by Article IV, section 2. Dred Scott's claim for freedom rested in part on the Missouri Compromise: he maintained that his residence and work in territory that was free under the Compromise required his emancipation upon return to Missouri. The Court did not simply reject Scott's claim—it declared the Compromise itself unconstitutional. According to Justice Catron, the Compromise deprived slaveholders of *their* "rights, privileges, and immunities" because it

deterred their migration: it "refused the[ir] right to emigrate to" free territory "unless they left their most valuable and cherished property behind them." *Dred Scott*, 60 U.S. at 526, 529 (Catron, J., concurring). In this sense, Justice Catron anticipated this Court's later jurisprudence invalidating durational residency requirements that likewise deter migration. Balkin & Levinson, *supra*, at 83.

Thankfully, the debate over citizenship and the rights attendant to it did not end with *Dred Scott*. Almost immediately after the decision, Congress took up whether to admit Oregon to the Union as a state. Particularly problematic was a provision in the constitution approved by territorial voters that would restrict free black migration: "No free negro, or mulatto, not residing in this State at the time of the adoption of this Constitution, shall come, reside, or be within this State," and "the Legislative Assembly shall provide . . . for the punishment of persons who shall bring them into the State, or employ" them. Or. Const. of 1857, art. XVIII, § 4. Members of Congress who opposed Oregon's admission contended that this provision violated Article IV's Privileges and Immunities Clause, and the ensuing debate "foreshadowed the congressional debate over the rights of citizenship during Reconstruction." Rebecca E. Zietlow, *Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship*, 36 Akron L. Rev. 717, 726 (2003).

Among those opposing Oregon's admission was Representative John Bingham, future architect of the Fourteenth Amendment's Privileges or Immunities

Clause, who saw the state constitutional provision as abridging the right of free blacks to migrate. In an 1859 speech, he argued that free blacks were, by virtue of their citizenship in their respective states, also citizens of the United States, and that Article IV would be rendered "a mockery" if it did not "restrain each and every State from closing its territory . . . against citizens of the United States." Cong. Globe, 35th Cong., 2nd Sess. 984 (1859). He "den[ied] that any State may exclude a law abiding citizen of the United States from coming within its Territory, or abiding therein, or acquiring and enjoying property therein, or from enjoyment therein of the 'privileges and immunities' of a citizen of the United States." *Id.*

2. The Right To Migrate In The Early Postbellum Years

For a (very) short time after emancipation, things looked more promising for blacks. "[I]nnumerable Negroes left the plantations on which they had worked" and "sought work elsewhere on better terms." Robert Cruden, *The Negro in Reconstruction* 20 (1969).

"[A]s advocates of free wage labor," Northern Republicans "supported the right of freed people to move about the region, relocate into cities, and even leave the South in hopes of financial betterment." Douglas R. Egerton, *The Wars of Reconstruction* 179 (2014). "Southern landlords," however, "desired just the opposite." *Id.* They saw in abolition "potential economic disaster," as "[m]obile, free African-American laborers

replaced a docile, inexpensive supply of African-American slave labor." David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 Tex. L. Rev. 781, 786 (1998) [hereinafter *Interstate Migration*].

"In response to African Americans' new market power, planters lobbied their state and local governments to regulate the labor market to African Americans' detriment." David E. Bernstein, *Only One Place of Redress* 8 (2001). "Many localities in the summer of 1865 adopted ordinances limiting black freedom of movement, prescribing severe penalties for vagrancy, and restricting blacks' right to . . . engage in skilled urban jobs." Eric Foner, *Reconstruction* 198 (updated ed. 2014). "Labor policy, however, could hardly be settled by a series of local measures," and calls resounded for, as one Mississippi planter put it, "laws to require the negro to remain at one place and labour." *Id.*

The result of these calls was the Black Codes, adopted by one Southern state after another from late 1865 through early 1867. *See* Theodore Brantner Wilson, *The Black Codes of the South* 61-115 (1965). "The main functions" of the codes "were to replace the labor controls of slavery and to limit the mobility of the black labor force." William Cohen, *At Freedom's Edge* 28 (1991). "Southern states employed a variety of devices . . . to control this mobility." Davison M. Douglas, *Contract Rights and Civil Rights*, 100 Mich. L. Rev. 1541, 1544 (2002). They included vagrancy, enticement, and, later, emigrant-agent laws. *See* Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative*

or Competitive?, 51 U. Chi. L. Rev. 1161, 1163-64 (1984).

The most commonly known example is the "vagrancy" laws, which every former Confederate state save Tennessee and Arkansas passed in 1865 or 1866. William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. of S. Hist. 31, 47 (1976). "Vagrancy statutes essentially made it a crime to be unemployed or out of the labor force." Roback, *supra*, at 1168. They also "limited the amount of searching for new, more remunerative employment" that the freedmen could undertake, *id.*, because "traveling in search of a new job would leave them vulnerable to arrest for vagrancy." Bernstein, *Interstate Migration*, *supra*, at 787. And most of these laws permitted the "hiring-out" of offenders, who were then forced to perform unpaid labor. Cohen, *At Freedom's Edge*, *supra*, at 33. W.E.B. Du Bois summarized the impact on the ability of blacks to pursue a living:

> [T]o make the best labor contracts, Negroes must leave the old plantations and seek better terms; but if caught wandering in search of work, and thus unemployed and without a home, this was vagrancy, and the victim could be whipped and sold into slavery.

W.E.B. Du Bois, *Black Reconstruction* 167 (1935).

Like vagrancy laws, "enticement" laws were also designed to inhibit the freedmen from traveling in pursuit of a livelihood. They did so, however, by

criminalizing the conduct of employers, who were prohibited from "enticing" away laborers under contract with other employers. Roback, *supra*, at 1166. The laws were designed "to eliminate the danger of outside interference" from "the industrial enterprises of the North and to a lesser extent those of the South." Oscar Zeichner, *The Legal Status of the Agricultural Laborer in the South*, 55 Political Sci. Quarterly 412, 426 (1940).

Another, slightly later development aimed at inhibiting black migration was laws imposing hefty taxes or licensing fees on "emigrant agents"—persons who recruited freedmen for better wages and working conditions off their plantations.[10] "[E]migrant agents played a key role in encouraging and financing African-American migration within the United States." Bernstein, *Interstate Migration*, *supra*, at 781. Planters, however, "sought to discourage or effectively ban emigrant agents to inhibit a free market in labor," *id.* at 792, and Southern legislatures often enacted emigrant-agent laws in response to "wave[s] of outmigration." Roback, *supra*, at 1169 (footnotes omitted).

There were other types of laws enacted to keep blacks "in their place," figuratively and literally. In some areas, government prohibited blacks from traveling without a "pass" issued by their employer. *See* Foner, *supra*, at 198. Contract-enforcement statutes,

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[10] Emigrant-agent laws were not contained in the original Black Codes but were lobbied for during the same period. Bernstein, *Interstate Migration*, *supra*, at 793. The first was enacted in 1870, three years before *Slaughter-House*. *Id.*

meanwhile, required blacks to enter into employment contracts and criminalized their breaking, thereby keeping blacks tied to plantations. *See id.* at 199-200. The common aim of all these laws was retention of "a coercive, race-based labor system by denying or restricting" the "freedom of travel" of blacks and "control over their own labor." James W. Fox Jr., *Publics, Meanings and the Privileges of Citizenship*, 30 Const. Comment. 567, 584 (2015).

3. The Joint Committee On Reconstruction

In light of these abuses, "Congress established the Joint Committee on Reconstruction to investigate circumstances in the Southern States and to determine whether, and on what conditions, those States should be readmitted to the Union." *McDonald*, 561 U.S. at 827 (Thomas, J., concurring in part and concurring in judgment). The Committee, which ultimately recommended adopting the Fourteenth Amendment, "justif[ied] its recommendation by submitting a report to Congress that extensively catalogued the abuses of civil rights in the former slave States." *Id.* It was replete with discussion of (1) abridgments of the freedmen's right to migrate in pursuit of a living and (2) Southern hostility toward newly-arrived residents from the North.

The vagrancy laws, in particular, received extensive treatment. The report provided general testimony about how they were being used to deny economic

opportunity to the freedmen,[11] but it also detailed specific instances where blacks were denied the opportunity to migrate in pursuit of a livelihood. For example, a witness from North Carolina testified that police in Gates County had "enforce[d] [the vagrancy] law on a person who had employment in Portsmouth and was earning her own living, who went out to get her own children." Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. pt. II, at 177. "She was seized before she had been there two days; her children refused to her, and under the vagrant act she was set to work on the old plantation without pay . . . as a slave." *Id.*

Another witness, from Mississippi, testified to similar abuses:

> The vagrant law of the State . . . is enforced by th[e] militia, and . . . the freedmen are not allowed to change their places at any time. I know of several instances where freedmen have gone from one county to another and made contracts, and were brought back by men . . . who whipped them and ordered them not to leave again . . . , even when they were under no contract with their former masters.

Id. pt. III, at 143. The report noted that, despite these abuses, federal agents continued to counsel the freedmen that they had the right to travel freely in pursuit of economic opportunity. *E.g.*, *id.* pt. IV, at 36 ("We told

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[11] *E.g.*, Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess. pt. II, at 35, 62, 126, 178, 243, 270 (1866); *id.* pt. III, at 70.

them . . . that they were free to go and come wherever they pleased, and to work for whomever they thought proper . . . .").

Also discussed were impediments and hostilities directed toward white Northerners migrating to the South. In some areas, for example, "persons coming to teach blacks were not permitted to rent a place either for a school or for their own personal occupation." *Id.* pt. II, at 143. In others, "any northern man coming down . . . to settle" would see "his cattle . . . poisoned, his hogs killed, and any improvements he made destroyed." *Id.* pt. II, at 179. While "emigrants from abroad would be kindly received," "emigrants from the north, or Union men, would be treated coldly or with indifference." *Id.* pt. III, at 27. As one witness testified, "I do not think it would be safe for northern men who have emigrated . . . if [federal] troops were withdrawn." *Id.* pt. I, at 119. The same was true for the freedmen. *Id.* pt. IV, at 123 (testifying that retention of federal troops was "necessary for the security of emigrants, freedmen, and capital").

4. Debate Over The Civil Rights Act Of 1866 And Other Pre-Fourteenth Amendment Legislation

Congress's first response to these abuses was not the Fourteenth Amendment, but rather the Civil Rights Act of 1866, 14 Stat. 27 (1866), which "is widely regarded as the precursor to the Fourteenth Amendment." *Saenz*, 526 U.S. at 526 n.6 (Thomas, J., dissenting).

Statements by members of Congress in the debates over the act (and contemporaneous legislation) reveal, like the Joint Committee's report, particular concern with the denial of the right to migrate that the freedmen and their Northern supporters were experiencing in the South.

The Act's author, Senator Lyman Trumbull, "began his discussion of the Civil Rights Bill with a reference to recent laws of Mississippi"—its Black Codes—and "declaring his intention 'to destroy all these discriminations.'" Foner, *supra*, at 244 (quoting Cong. Globe, 39th Cong., 1st Sess. 475 (1866)). Mississippi's laws, Trumbull explained, provided that "if any colored person, any free negro or mulatto, shall come into that State for the purpose of residing there, he shall be sold into slavery for life," and that "[i]f any person of African descent residing in that State travels from one county to another without having a pass or a certificate of his freedom, he is liable to be committed to jail and to be dealt with as a person who is in the State without authority." Cong. Globe, 39th Cong., 1st Sess. 474 (1866). Trumbull discussed, as well, Representative Samuel Hoar of Massachusetts, who, in 1844, had traveled to South Carolina to challenge that state's negro seaman act, only to be expelled from the state and thereby denied, according to Trumbull, his "privileges and immunities" under Article IV, section 2. *See id.* at 474, 475.

Trumbull then quoted Justice Washington's *Corfield* decision—including its recognition of "[t]he right of a citizen of one state to . . . reside in any other state,

for purposes of trade, agriculture, [or] professional pursuits," *Corfield*, 6 Fed. Cas. at 552—and stressed immediately thereafter that the freedman had "the right to travel, to go where he please[d]," and to "pursu[e] . . . happiness" when he got there. Cong. Globe, 39th Cong., 1st Sess. 475 (1866). Thus, Trumbull explained, his bill would "declar[e] all persons born in the United States to be citizens thereof" and "entitled to the rights of citizens," including, specifically, "the right to go and come at pleasure," as well as "to make contracts" and "acquire property." *Id.*

Representative James Wilson introduced the bill in the House and also discussed the right to migrate in connection with the pursuit of a livelihood. Stressing the bill's concern for the rights of "citizens of the United States," he asked rhetorically, "What are these rights?" *Id.* at 1118. Quoting Blackstone, he answered: "The right of personal liberty," which "'[c]onsists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct.'" *Id.*

Discussion of the right to migrate was common throughout the ensuing debates. Representative John Broomall, for example, noted that "rights and immunities of citizens were habitually and systematically denied" in the South—including, specifically, the "right of transit" and "right of domicile." *Id.* at 1263. And Senator Peter Van Winkle noted that "[t]he constitution of Indiana, and the laws of several States, forbid [blacks] to come within their borders for permanent residence,"

and that these "prohibitions would be of no effect if [blacks] [we]re citizens." *Id.* at 497.

Senator Trumbull's bill was enacted by the Congress, but President Johnson vetoed it, purportedly over concerns with its constitutionality. *Id.* at 1679-81. Congress overrode the veto, but not before Senator Trumbull again stressed the importance of the right to move to a new state and reside there on equal terms: "[W]hat rights do[es] [a] citizen[] of the United States have? . . . He has a right . . . to go into any state in the Union and to reside there, and the United States Government will protect him in that right." *Id.* at 1757.

Congress's contemporaneous consideration of other legislation, including Representative Samuel Shellabarger's "Bill to Declare and Protect All the Privileges and Immunities of Citizens of the United States in the Several States," H.R. Res. 437, 39th Cong. (1866)—or "Privileges and Immunities Bill"—likewise reveals a concern with protecting the right to migrate in pursuit of a livelihood. This bill "was designed as a companion to the Civil Rights Act": whereas "[t]he Civil Rights Act generally protected individuals against discrimination under state law," the Privileges and Immunities Bill was designed to protect "against interstate discrimination." Philip Hamburger, *Privileges or Immunities*, 105 Nw. U. L. Rev. 61, 116 (2011). The bill provided that

> every person, being a citizen of the United States shall, in right of such citizenship, be entitled, freely and without hindrance or molestation, to go from the State . . . of his or her residence, and to pass into and . . . remain and

> take permanent abode within each of the several States, . . . and therein . . . do and transact business . . . as fully as such rights and privileges are held and enjoyed by the other citizens of such State . . . .

H.R. Res. 437, § 1, 39th Cong. (1866).

As Shellabarger explained, the bill would protect those who "seek to or are attempting to go either temporarily or for abode from their own State into some other," and it would secure in such persons "those great international rights which are embraced in unrestrained and secure inter-State commerce, intercourse, travel, sojourn, and acquisition of abode." Cong. Globe, 39th Cong., 1st Sess. app. 293 (1866). The bill would make clear that these are rights of "national citizenship" that "cannot be taken away from any citizen of the United States by the laws of any State, neither from its own citizens nor from those coming in from another State." *Id.* While the bill failed because of constitutional objections, "the Fourteenth Amendment overcame this obstacle by elevating the Bill's main principle to a constitutional guarantee." Hamburger, *supra*, at 115.

Concern with protecting the right to migrate in pursuit of a livelihood also animated the Second Freedmen's Bureau Bill, which, as enacted, provided: (1) that all citizens enjoyed the "full and equal benefit of all laws . . . concerning personal liberty"; and (2) that Freedmen's Bureau officers would have judicial authority over "cases and questions concerning the free enjoyment of such immunities and rights." 14 Stat.

173, 176-77 (1866). Senator Trumbull maintained that the bill would "declare null and void all laws which will not permit the colored man to contract, . . . which will not permit him to buy and sell, and to go where he pleases." Cong. Globe, 39th Cong., 1st Sess. 322 (1866). Representative Donnelly, meanwhile, identified the vagrancy, enticement, and contract-enforcement laws of Southern states as evidence of the need for the bill. *Id.* at 588-89.

These "[s]tatements made by Members of Congress leading up to" the Fourteenth Amendment "can assist in th[e] process" of interpreting the amendment, because "they demonstrate the manner in which the public used or understood" the term "privileges or immunities." *McDonald*, 561 U.S. at 828 (Thomas, J., concurring in part and concurring in judgment). They make clear that the public understood that term to include the right to migrate to and reside in another state in pursuing a livelihood—and to be treated on equal terms in that pursuit.

5. Debate Over the Fourteenth Amendment

Congressional debate over the Fourteenth Amendment itself likewise evinces an understanding of the term "privileges or immunities" that encompassed the right to migrate in pursuit of a livelihood. This is hardly surprising, given that the Fourteenth Amendment was designed to provide: (1) a constitutional basis for the Civil Rights Act of 1866 and Second

Freedmen's Bureau Act, Jacobus tenBroek, *Equal Under Law* 201 (rev. ed. 1965), as well as (2) the protections envisioned by the Privileges and Immunities Bill, Hamburger, *supra*, at 119-20, 123.

Representative John Bingham submitted his first draft of the amendment to Congress in December 1865. In January 1866, he spoke in the House to explain its purpose. He quickly alluded to the Samuel Hoar affair, stressing that the guarantee of Article IV, section 2's Privileges *and* Immunities Clause "was utterly disregarded in the past by South Carolina when she drove . . . from her limits the honored representative of Massachusetts." Cong. Globe, 39th Cong., 1st Sess. 158 (1866). "I propose, with the help of this Congress and of the American people, that hereafter there shall not be any disregard of that essential guarantee of your Constitution in any State of the Union." *Id.*

Bingham's proposal was submitted to and revised by the Joint Committee on Reconstruction. When it was taken up again in late February 1866, it provided that Congress would have "power to make all laws . . . necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States." *Id.* at 1088. The surrounding debate confirms the understanding that such "privileges and immunities" included the right to travel to, and be treated equally in, a new state upon arrival.

For example, Representative Hiram Price stated that he "understood [the amendment] to mean simply this: if a citizen of Iowa or a citizen of Pennsylvania has

any business" in "South Carolina or Georgia, he shall have the same protection of the laws there that he would have had had he lived there for ten years." *Id.* at 1066. "[T]he intention," he added, "is to give the same rights, privileges, and protection to the citizen of one State going into another that a citizen of that State would have who had lived there for years." *Id.*

John Bingham confirmed Price's understanding. Speaking the same day, he explained the types of state conduct the amendment would prohibit and used, as an example, Oregon's constitutional bar on free blacks migrating to and taking up residence in the state. *Id.* at 1065. He also stressed, however, that it would "protect . . . loyal white citizens of the United States . . . against banishment" from Southern states. *Id.* The next day, Bingham emphasized that no state had the power "to withhold from any citizen of the United States within its limits . . . any of the privileges of a citizen of the United States, or to impose upon him, no matter from what State he may have come, any burden contrary to that provision of the Constitution which declares that the citizen shall be entitled in the several States to all the immunities of a citizen of the United States." *Id.* at 1089.

Representative Giles Hotchkiss followed Bingham. "As I understand it," he stated, the "object in . . . proposing this amendment is to provide that no State shall discriminate between its citizens"—that is, "give one class of [its] citizens greater rights than it confers upon another" or "exclu[de] . . . any class of citizens in [the] State from the privileges which other classes

enjoy." *Id.* at 1095. Hotchkiss, however, did not think the amendment as then worded was sufficiently strong in this regard and accordingly urged postponement of its consideration until "we can devise some means whereby we shall secure those rights beyond a question." *Id.*

Bingham temporarily withdrew his amendment. "By the time the debates on the Fourteenth Amendment resumed, Bingham had amended his draft of § 1 to include the text of the Privileges or Immunities Clause that was ultimately adopted." *McDonald*, 561 U.S. at 831 (Thomas, J., concurring in part and concurring in judgment).

Senator Jacob Howard reported the new draft to the Senate. *Id.* He began his floor speech by recounting the work of the Joint Committee in investigating and reporting on abuses in the Southern states. *See* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). "One result of the[se] investigations," he explained was "the joint resolution for the amendment of the Constitution . . . now under consideration." *Id.*

Howard then turned to the Privileges or Immunities Clause specifically, linking it, in part, to the Privileges *and* Immunities Clause of Article IV, section 2. Quoting *Corfield*, he identified some of the "privileges and immunities" protected by the latter clause, including, specifically, "[t]he right of the citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, [or] professional pursuits." *Id.* (quoting *Corfield*, 6 Fed. Cas. at 552). The problem,

according to Howard, was that "there [wa]s no power given in the Constitution to enforce and carry out any of these guarantees." *Id.* "The great object of the first section of this amendment," he explained, was "to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766. Three weeks after Howard's speech, Congress approved the amendment and proposed it to the states.

In short, Congress clearly understood the right to migrate in pursuit of a livelihood as among the "privileges" or "immunities" the amendment would protect. It understood the Privileges or Immunities Clause as a constitutional guarantee against laws like the Black Codes, which had denied the freedmen the right to migrate in search of a better living off the plantation. And it also understood that the clause would protect white Northerners who wished to migrate in search of economic opportunity—that it would "enable [them] to relocate to Southern states free from discrimination against 'Yankees' and 'carpetbaggers.'" Akhil Reed Amar, *Lost Clause: The Court Rediscovers Part of the Fourteenth Amendment*, New Republic, June 14, 1999, at 14.

6. Understanding Of The Ratifying Public

This understanding was not lost on the ratifying public. Newspapers widely reported Bingham's proposal and the speeches concerning it, and this coverage

"suggests public awareness of [the clause's] main contours." *McDonald*, 561 U.S. at 831 (Thomas, J., concurring in part and concurring judgment). As the ratification debates played out in the states, meanwhile, this understanding of the clause remained evident.

For example, in November 1866, The New York Times ran a pair of letters to the editor urging ratification. Alluding to *Corfield*, the first explained that "rights and privileges of a citizen of the United States" protected by the Privileges or Immunities Clause included "the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise." *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, at 2. The second recounted some of the abuses necessitating the amendment, including that a free black man "could not change his residence, nor travel at pleasure." *Political Affairs: National Politics: The Proposed Constitution Amend.—What it Provides*, N.Y. Times, Nov. 15, 1866, at 2.

Speeches urging ratification made similar points. Judge Noah Davis maintained that the amendment would protect the right "to migrate from one State to another" and "to do lawful labor and have its fruits." Michael Kent Curtis, *No State Shall Abridge* 140 (1986) (quoting *Proceedings of the Republican Union State Convention* 35 (Sept. 5, 1866)). A speaker in Ohio similarly explained that the amendment's first section would guarantee "the rights, immunities, and privileges of American citizenship" to all citizens, including

"the right of locomotion—the right to go where they please and live where they please, and own property where they please." James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 Akron L. Rev. 435, 448 (1985) (quoting Dayton Daily Journal (Ohio), July 9, 1866, at 2, col. 1).

The public understood, too, that the clause would protect Northerners migrating to the South in pursuit of economic opportunity, as Representative Columbus Delano observed in an August 1866 speech:

> I know very well that the citizens of the South and of the North going South have not hitherto been safe in the South, for want of constitutional power in Congress to protect them. I know that white men have for a series of years been driven out of the South when their opinions did not concur with the 'chivalry' of the Southern slaveholders .... And I know that we determined that these privileges and immunities of citizenship by this amendment of the Constitution ought to be protected ....

Speech of Hon. Columbus Delano, Cincinnati Commercial, Aug. 31, 1866, at 2, col. 3. A Philadelphia paper similarly assured readers that, upon ratification, there would be "freedom of interstate migration." Chester J. Antieau, *The Original Understanding of the Fourteenth Amendment* 34 (1981) (quoting Philadelphia North American and United States Gazette, June 30, 1868, at 2, col. 1).

Opponents of the amendment, meanwhile, saw this as reason to oppose it. Perhaps prescient of cases like the present one, they objected to the extension of federal court jurisdiction into cases of discrimination "between native white citizens . . . and immigrants from other states." James E. Bond, *Ratification of the Fourteenth Amendment in North Carolina*, 20 Wake Forest L. Rev. 89, 98 (1984) (quoting *Wadesboro Argus*, Oct. 11, 1866, at 1, col. 2).

* * *

In short, the Report of the Joint Committee on Reconstruction, debates on Reconstruction-era civil rights legislation, debates on the Fourteenth Amendment itself, and public discussion of the amendment during ratification all confirm that the *Slaughter-House* majority, *Slaughter-House* dissent, and *Saenz* majority were on sound historical footing in recognizing that the Privileges or Immunities Clause protects a right to migrate and be treated equally in one's new state, including—indeed, especially—in pursuit of a livelihood.

So, too, was Justice Thomas in his *Saenz* dissent and *McDonald* concurrence. The historical record can indeed "be read to support the view that the Privileges or Immunities Clause protects some" of "the fundamental rights of 'citizens' described in *Corfield*," *McDonald*, 561 U.S. at 834 (Thomas, J., concurring in part and concurring in judgment), and one of them is "[t]he right of a citizen of one state . . . to reside in any other state, for purposes of trade, agriculture, [or] professional

pursuits," *Saenz*, 526 U.S. at 525 (Thomas, J., dissenting) (quoting *Corfield*, 6 F. Cas. at 552). "[T]he privileges and immunities of American citizenship," in other words, may well "overlap to at least some extent with the privileges and immunities traditionally recognized in citizens in the several States." *McDonald*, 561 U.S. at 853 (Thomas, J., concurring in part and concurring in judgment). That overlap encompasses the right at issue here. "Article IV ha[d] long been understood to prohibit a state from discriminating against visitors from sister states," particularly in their pursuit of a livelihood, and "[w]hat Article IV did for visitors, the Fourteenth Amendment did for new residents." Amar, *supra*, at 14.

Indeed, one of the most important purposes of the Privileges or Immunities Clause was to allow the newly-freed slaves (and their Northern supporters) to migrate to new states and work when they arrived. Southern states had routinely tried to "exclude[ ]" the freedmen and Northerners "from many occupations of gain" by making it virtually impossible—if not illegal—for them to move or work if they did move. *Slaughter-House*, 83 U.S. (16 Wall.) at 70. The Fourteenth Amendment's framers and ratifying public sought to end such abuse with the Privileges or Immunities Clause, yet Tennessee continues to engage in it, using two- and ten-year durational residency requirements to bar any newly-arrived resident from the

occupation of owning and operating a retail liquor store. This Court should not allow it.[12]

D. Invalidating The Durational Residency Requirements Would Promote, Not Hinder, Federalism

The Association contends that invalidating Tennessee's durational residency requirements would deny states the ability to operate as laboratories of experimentation and contravene the "federalist values inherent in the Twenty-first Amendment." Pet'r's Br. 31, 47. It would do nothing of the sort. States would still be free to ban alcohol or allow it. They would still be free to allow the sale of certain types of alcohol but not others. They would still be free to adopt a three-tier system or a state-run monopoly. What states would not be able to do is implement protectionist schemes that discriminate against newly-arrived residents in favor of long-term residents.

And that is as it should be. No state can "force[] non-residents settling in the State to accept a status inferior to that of oldtimers." *Zobel v. Williams*, 457 U.S. 55, 74 (1982) (O'Connor, J., concurring in judgment). This principle is all-the-more imperative when it comes to the newly-arrived resident's ability to *work*. "Typically, Americans migrate with the intention of taking employment in their destination states, and

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[12] There is no Twenty-first Amendment "immunity" from challenge under the Fourteenth Amendment. *See Granholm*, 544 U.S. at 486-87.

today a central object of the right to travel is freedom of access to work in an employment market that is national in scope." Karst, *supra*, at 549. States cannot hoard or reserve economic opportunity for longtime residents only.

The right of the newly-arrived resident to equal treatment, moreover, fits squarely within our federalist design. "Part of what connects state sovereignty to the larger picture of our constitutional scheme is that the states represent centers of democratic choice; they are the loci of our republicanism." Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110, 156 (1999). But "[s]tates are able to serve as centers of democratic choice [only] because . . . people choose their states of residence": they "vote with their feet . . . in deciding which state to call home" and "where to seek employment." *Id.* In this light, protecting a citizen's right to migrate to, and be treated equally in, a new state "allows for *more* innovation and experimentation in government"—not less. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (emphasis added).

Thus, while invalidating Tennessee's durational residency requirements may restrict, in one very narrow way, a state's discretion with respect to retail liquor licensing, it will also promote the very values of federalism that justify affording states discretion to regulate alcohol in the first place.

CONCLUSION

For the foregoing reasons, this Court should affirm the Sixth Circuit's judgment.

Respectfully submitted,

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